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WESTERN DISTRICT OF TEXAS  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WESTERN TEXAS

14 J. D. ISAACS

15 Plaintiff, *pro se*,

16 -V-

17 DARTMOUTH HITCHCOCK MEDICAL CENTER; )  
18 DOCTOR CHRISTINE FINN; )  
19 MARY HITCHCOCK MEMORIAL HOSPITAL; )  
20 TRUSTEES OF DARTMOUTH COLLEGE; )  
21 and JOHN DOE, )  
22 Defendants. )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

Case No. 14-mc-0012-XR

**REPLY TO  
MOTION TO ENFORCE  
SUBPOENA DUCES TECUM**

1                    **PLAINTIFF'S REPLY TO MOTION TO ENFORCE SUBPOENA DUCES TECUM**

2  
3                    This reply addresses concerns raised by the Administrative Office of the U.S. Courts'  
4                    PACER Service Center, as filed by the U.S. Attorney for the Western District of Texas in  
5                    response to Plaintiff's motion for subpoena enforcement.  
6

7                    **Correspondence with the AOUSC Substantially Complied with *Touhy* Regulations**

8                    Although not formally captioned as a *Touhy* request, the Plaintiff attempted on multiple  
9                    occasions to engage in dialogue with the AOUSC about the relevance of the subpoena  
10                  records. Prior to filing this motion, Plaintiff sought to confer with the AOUSC for review of  
11                  the subpoena via multiple emails. Plaintiff made several phone calls to Mr Sigmund Adams,  
12                  the designated individual at the AOUSC. In the spirit of *Touhy*, he sent Mr. Adams a letter  
13                  (Exhibit A) including a draft of this motion to enforce the subpoena, in hopes Mr. Adams  
14                  would appreciate the relevance and avoid the need for judicial intervention. The letter  
15                  specifically asked AOUSC to review the proposed motion **in order to confer** about the  
16                  subpoena relevance:

17                        *"I am attaching a draft Motion to Enforce Subpoena, to be filed in San Antonio. I*  
18                        *hope that after your review of the motion, you will reconsider whether or not to*  
19                        *produce the records. I believe that these records may represent some of the last*  
20                        *physical evidence of various civil and criminal allegations pending, and hence view*  
21                        *them as critical evidence...*

22                        ***Again, the attached motion is only a draft intended to confer with you for your***  
23                        ***review."***

24                  The *Touhy* request can be an evolving process in which the original written request is  
25                  supplemented and modified during the course of discussions and communications with the  
26                  agency. (*U.S. v. Guild*, 2008 WL 169355 (E.D. Va. 2008); *In re PE Corporation Securities*  
27                  *Litigation*, 2005 WL 806719 (D. Conn.). In fact, it is a good practice to try and meet each of  
28                  the agency's objections through the use of supplemental written *Touhy* requests, so the record

1 that arrives at the court contains sufficient facts to support the request. *Westchester General*  
2 *Hospital, Inc.*, 770 F. Supp. 2d 1286; *In re PE Corp. Securities Litigation*, 2005 WL 806719  
3 (D. Conn.). In the matter at hand, Plaintiff made diligent efforts to communicate with the  
4 AOUSC. Immediately upon filing the motion, Plaintiff again asked the AOUSC to consider  
5 his letters (Exhibit B) :

6 “Please let me know if you are able to make the negative declaration and avoid  
7 further work for the Courts[i.e retract the motion].”

8 Next, Plaintiff inquired with the AOUSC on January 23, 2014 to see if they would be  
9 responding to the Motion to Enforce (Exhibit C), or if they might reconsider and confer with  
10 the Plaintiff:

11 “About a month ago I filed a motion to enforce the PACER subpoena, and sent  
12 you a copy. I have not yet been served with any response. Please let me know if  
13 you plan to respond[to the motion], or if I should file a motion for default, or if  
14 you have reconsidered to produce the PACER records.”

15 As the Court is aware, the AOUSC did not respond to the motion, nor did the AOUSC  
16 ever file a timely motion to quash the original subpoena. In short, the AOUSC ignored  
17 Plaintiff’s attempts spanning five months to confer on the matter, and now incorrectly assert  
18 that the Plaintiff did not comply with the *Touhy* regulations.

19 Finally, the Plaintiff has today sent the US Attorney a further outline addressing the  
20 relevance of the PACER data (Exhibit D) to both civil and criminal claims filed with the U.S.  
21 Department of Justice.

22 A recent academic review cites *Touhy* as “fiction” in Federal litigation

23 A well cited recent summary of *Touhy* is found in *Georgetown Law Review* “Taking  
24 *Touhy* Too Far” (2011 Vol.99:1227):

25 “Although some agencies continue to invoke an amorphous ‘housekeeping  
26 privilege’ to resist disclosing subpoenaed records, the vast majority of courts and  
27 commentators that have addressed the issue recognize that the housekeeping privilege  
28 is a fiction.” citing *Hous. Bus. Journal, Inc. v. Office of the Comptroller of the*

1           *Currency*, U.S. Dep’t of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (“[N]either the  
2           Federal Housekeeping Statute nor the *Touhy* decision authorizes a federal agency to  
3           withhold documents from a federal court.”); *In re Bankers Trust Co.*, 61 F.3d 465, 470  
4           (6th Cir. 1995) (“Section 301 . . . is nothing more than a general housekeeping statute  
5           and does not provide ‘substantive’ rules regulating disclosure of government  
6           information.” (quoting *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 777  
7           (9th Cir. 1994))); *Exxon*, 34 F.3d at 778 & n.6 (“[N]either the [housekeeping] statute’s  
8           text, its legislative history, nor Supreme Court case law supports the government’s  
9           argument that [the statute] authorizes agency heads to withhold documents or  
10          testimony from federal courts.... Every commentator we are aware of who has  
11          addressed the issue has reached the same conclusion.”); *In re Motion to Compel*  
12          *Compliance with Subpoena Direct to Dep’t of Veterans Affairs*, 257 F.R.D. 12, 15  
13          (D.D.C. 2009) (noting that *Touhy* regulations do not “confer a separate privilege upon  
14          the government, nor create a legal basis to withhold information pursuant to a federal  
15          subpoena”); Coleman, *supra* note 25, at 688–89 & n.21 (“The proposition for which  
16          *Touhy* is often cited—that a government agency may withhold documents or  
17          testimony at its discretion—simply is not good law and hasn’t been since 1958.”  
18          (citing *Comm. For Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C.  
19          Cir. 1971) (“In our view, this claim of absolute immunity for documents in possession  
20          of an executive department or agency, upon the bald assertion of its head, is not sound  
21          law.”))).

22  
23           The matter at hand includes claims of federal retaliation, fraud, and subversion of  
24          process (see Exhibit D). Substantial damages to Plaintiff’s health and career must be weighed  
25          against any decision to withhold important discovery material. As such, stretching *Touhy* to  
26          apply to this case seems to counter the vast majority of case law, as the Federal Rules of Civil  
27          Procedure (Rule 45) directly allows this Court to determine the substantive relevancy of the  
28          evidence pertaining to federal claims.

1                   Touhy's Role for Resource Allocation and Cost Saving

2                   Touhy's implementations largely serve as measures to centralize and limit the  
3 resources the federal government expends on private litigation. In this case, two years of  
4 exhaustive litigation, now involving four federal courts, may be resolved by producing the  
5 easily retrievable PACER meta-data. In fact, the PACER data has already been retrieved by  
6 Mr. Ralph Gutierrez (see Exhibit D). If a cost-analysis were to be performed, it is hard to  
7 imagine any cost-justification against producing the readily available PACER data, which are  
8 critical to Plaintiff's case (See, again, Exhibit D). In fact, a jury trial (and/or appeals) may be  
9 averted by resolving any question of fact as to how and when Dartmouth learned about the  
10 2006 litigation.

11                   Even under the APA standard, the AOUSC response appears somewhat arbitrary

12                   An agency's rejection of a *Touhy* request will be considered arbitrary and capricious if  
13 it is merely a pro forma conclusory denial. *In re PE Corp. Securities Litigation*, 2005 WL  
14 806719 (D. Conn.). More is required from federal agencies. They "must examine the relevant  
15 data and articulate a satisfactory explanation for [their] action including a rational connection  
16 between the facts found and the choice made." *In re Vioxx Products Liability Litigation*, 235  
17 F.R.D. 334, 346 (E.D. Lou. 2005). "Likewise, an agency's action will also be considered  
18 arbitrary and capricious when it ... entirely failed to consider an important aspect of the  
19 problem. " *U.S. v. Walker*, 2009 WL 2611522 (M.D. Ga. 2009) (overturning agency denial  
20 of *Touhy* request) quoting *Miccosukee Tribe of Indians of Florida v. U.S.*, 566 F.3d at 1257,  
21 1264 (11th Cir. 2009).

22                   In this case, Plaintiff offered the agency numerous occasions to discuss the relevance  
23 of the records sought. Likewise, Plaintiff declares that he made every possible effort to obtain  
24 discovery through other non-federal sources before PACER, but all have been unsuccessful or  
25 blocked by *nine* law firms representing the defendants. Plaintiff has been willing to make  
26 available to the AOUSC nearly forty hours of depositions (conducted *pro se*) and some ten-  
27 thousand pages of evidence. The agency failed to examine, even superficially, the discovery  
28 materials. Likewise, the agency failed to respond at all to Plaintiff's *Touhy* follow ups – on

1 three occasions, spanning five months. The agency provided no explanation for denial, other  
2 than boilerplate regulations. Moreover, the agency did not proffer a single claim for privilege,  
3 which it cannot do in good faith. In fact, there is no privilege that exists for the PACER meta-  
4 data. The data are merely time-stamps and corresponding account name identifiers. Routine  
5 subpoenas executed every day in the judiciary system reveal far more sensitive information  
6 than the PACER meta-data that. No privileged communications, opinions of judiciary  
7 employees, or personal testimony is sought; merely a time-data-name log of the \$0.10 charges  
8 levied by PACER by those who viewed Plaintiff's 2006 lawsuit.

9  
10 Conclusion and Assent to *In Camera* inspection

11 For the aforementioned reasons, Plaintiff believes that *Touhy* has been substantially  
12 complied with in seeking the PACER billing meta-data. Moreover, the majority of case law  
13 and congressional and academic commentary suggest that *Touhy* does not dismantle the  
14 Federal Rules of Civil Procedure, which required PACER's subpoena compliance.

15 The AOUSC, via the U.S. Attorney's office, has offered an *In Camera* inspection  
16 subject to any protective order this Court deems necessary. The Plaintiff is agreeable to such  
17 compromise, and submits that several minutes inspection is likely to substantially reduce the  
18 overall resources the judiciary expends on the pending case. Furthermore, inspection of the  
19 PACER data promotes truth and fairness, and sets a precedent that might potentially avoid a  
20 retaliation like what Plaintiff experienced from ever occurring again.

21  
22 Respectfully submitted, this 16<sup>th</sup> day of April, 2014.

23  
24 Jeffrey D. Isaacs

25 Dr J. D. ISAACS (Plaintiff, *pro se*)

26 3553 West Chester Pike Unit 177

27 Newtown Square, PA 19073  
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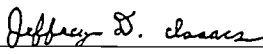
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**CERTIFICATE OF SERVICE**

I, J.D. Isaacs, do declare as follows:

I certify that a copy of the foregoing **REPLY TO MOTION TO ENFORCE SUBPOENA DUCES  
TECUM** was delivered via email and USPS to PACER/US Attorney counsel, and to counsel for the  
Defendants.

Executed on this 16<sup>th</sup> day of April, 2014.



J. D. ISAACS

Plaintiff, *pro se*